Supreme Court of the United States.

The People's National Bank of Lynchburg, Appellant,

vs.

Morton Marye, Auditor of Public Accounts of Virginia, Appellee.

Brief of Argument of William A. Anderson, Attorney-General of Virginia, and, as such, Counsel for the Appellee.

This case is one of several injunction suits brought in 1896 by national banks, to enjoin and restrain the Auditor of Public Accounts of Virginia from proceeding, under the statutes of that State, to collect unpaid and delinquent taxes imposed by the laws of Virginia upon the owners of shares of stock in national banks, it being understood that this is to be a test case.

A careful consideration of the facts presented here must satisfy the court that the wisdom of the salutary doctrine so often approved by this court—that judges and courts should proceed with great caution in stopping the collection of a State's revenue by interposition of the summary writ of injunction, and that this should never be done except where the relief is essential to the maintenance of the citizen's rights, and in a case where he has no other legal remedy—has been demonstrated by the procedure and the history of this litigation.

By the injunction awarded in this cause by the honorable circuit judge on the 22d of July, 1896, the State of Virginia has been prevented from collecting any taxes whatever from the stockholders of the People's National Bank of Lynchburg, for more than seven years. Indeed, as appears from the record, no

taxes have been paid to the Commonwealth upon any of the shares of the capital stock of said bank since the first day of January, 1891; and this, although, as is shown by the exhibits filed with complainant's amended and supplemental bill, and printed at pages 31-65 (inclusive) of the record, a great majority of those shareholders, in number and interest, claim no deduction whatever on account of debts and liabilities which they owed to others.

Without contributing, or even offering to contribute, a dollar of the large amount manifestly due by their own showing upon this valuable and productive property, towards supporting the government of the State and meeting the just obligations imposed upon them in common with the other citizens of the Commonwealth, these shareholders, at the suit of this bank, have, as a result of the restraining order of the court below, been granted, so far, immunity from any contribution to the public burdens, and the State has been deprived of a very large amount of revenue to which, upon the face of this record, she is undoubtedly entitled, even if every contention of the appellant should be sustained.

The justice of these views is amply sustained by the clear and vigorous statement of the facts and law of the case, presented in the opinion of Judge Waddill, at pages 79-92 of record. The reasoning and conclusions therein expressed have not been successfully assailed by the able and elaborate argument of counsel for the appellant; and a fuller consideration of the case will, as I shall endeavor now to show, amply sustain the decision of the court below.

THE DEMURRER TO THE BILL SHOULD HAVE BEEN SUSTAINED FOR THE FOLLOWING REASONS:

First. The plaitiff here (the bank) sustained no such relations to the subject-matter of the controversy, or to its stockholders, as entitled it to maintain this suit.

There are two Virginia statutes imposing taxes upon shares in national banks, which are sought to be impeached in this suit.

The first is the act of March 6th, 1890, which is as follows:

"Taxes on banks.

"17. No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks or banking associations shall be assessed and taxed on the market value of their shares of stock therein *at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in this State.* It shall be the duty of each commissioner of the revenue annually, during the month of May, to report to the Auditor of Public Accounts the name of each bank or banking association doing business in his district, and the names of the officers thereof, and to assess the share or shares of each stockholder in the banks or banking associations as aforesaid at the market value thereof as of the first day of February in each year, and it shall be the duty of each of such banks or banking associations forthwith to pay into the Treasury of the State the tax imposed by law upon such assessment of the shares aforesaid on or before the first day of

June. If such tax be not paid within thirty days after the assessment of said shares, the cashier of the bank or banking association failing to make payment, and his sureties, shall be liable for the same, and twenty per centum upon the amount to be recovered, on motion of the Auditor of Public Accounts, in the Circuit Court of the city of Richmond, upon fifteen days' notice, according to the provisions of the section seven hundred and thirteen of the Code of Virginia. The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed."

While this act undertook to make it the duty of every bank of the Commonwealth, whether State or national, to pay the tax imposed by law upon such assessment of its shares, into the State Treasury on or before the first day of June in each year, it imposed no penalty upon the bank for failing to do this. It in no sense made the bank responsible in any way for failing to do it. It did provide that upon the failure of the bank to pay the tax within thirty days after the assessment of its shares its cashier and his sureties should be liable for the same and twenty per cent. upon the amount, to be recovered upon motion by the Auditor of Public Accounts, in the Circuit Court of the city of Richmond. But that *provision* was, it must be conceded, mere *brutum fulmen,* and was, in fact and in law, a "dead letter" upon the statute book.

Though no taxes whatever were paid to the State upon the stock of the appellant, by its shareholders for five years after its enactment, yet the Auditor of Public Accounts never instituted any proceedings under it against the cashier of the People's National Bank of Lynchburg or his sureties; and it is fair to conclude that he never intended to institute any proceedings under that act, the provisions of which, in undertaking to hold one man liable for another man's obligation, were manifestly in contravention of "law of the land."

It is earnestly argued that, because the provision of this statute, which undertook to give a legally impossible remedy

for the collection of the tax, is invalid, the whole enactment expressed in the same section is void—that, *because the penalty* prescribed for its non-payment *is inoperative,* the *tax itself* is a *nullity.*

No such position can be maintained.

> "The fact that part of a statute is unconstitutional does not authorize the court to adjudge the remainder void, unless the provisions are so interdependent that one cannot operate without the other, or so related in substance as to preclude the supposition that the Legislature would have passed one without the other."
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> *Am. and Eng. Ency. of Law* (2nd Ed.), Vol. 6, p. 1088.

The rule has been succinctly stated by this court to be as follows:

> "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable."
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> *Packet Company* v. *Keokuk,* 95 U. S., 89.
> *Penniman's Case,* 103 U. S., 716-717.
> *Unity* v. *Burrage,* 103 U. S., 458-459.
> *Presser v. Illinois,* 116 U. S., 458-459.
> *Reagan* v. *Farmers Loan and Trust Co.,* 154 U. S., 395.

"The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but *whether they are essentially and inseparably connected in substance.* If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and *capable of being executed* in accordance with the apparent legislative in-

tent, wholly independent of that which was rejected, it must be sustained." (Italics here and elsewhere in this brief are mine.)

Cooley Const. Lim., 5th Ed., p. 212.

The rule is, therefore, substantially that, if the statute, after eliminating the invalid provision, presents a valid enactment, *capable of being enforced* by appropriate legislation, the act, as thus reformed, will stand.

If we apply this rule to the act in question, it will read as follows:

"Taxes on banks.

"17. No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks or banking associations shall be assessed and taxed on the market value of their shares of stock therein at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in this State. It shall be the duty of each commissioner of the revenue annually, during the month of May, to report to the Auditor of Public Accounts the name of each bank or banking association doing business in his district, and the names of the officers thereof, and to assess the share or shares of each stockholder in the banks or banking associations as aforesaid at the market value thereof as of the first day of February in each year, and it shall be the duty of each of such banks or banking associations forthwith to pay into the Treasury of the State the tax imposed by law upon such assessment of the shares aforesaid on or before the first day of June. * * * The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed."

Nor would the valid, proper, and necessary clause of this

act, which imposed this just tax, be rendered void, if the clause providing for ascertaining the value of the shares should be held to be an invalid exercise of legislative power. Eliminating that clause also, there would remain a proper enactment *capable of being enforced* by appropriate legislation.

It will be seen, however, that there is no complaint of overvaluation of the shares. The only complaint is that proper deductions from that valuation have not been allowed to the individual owners of the bank shares.

Here, the part of section 17 of the act of 1890, which levied a tax on bank shares, was a distinct, substantive, independent provision, which, as will be presently seen, was a perfectly valid and proper exercise of the power conceded to the State Legislature by section 5219 of the United States Revised Statutes.

It was not only a proper, but a necessary enactment, which it was incumbent upon the Legislature to make in discharge of the sworn duty of its members under the mandate of section 1, Article X., of the then State Constitution, which provided that, "All property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law."

And this just and proper tax will stand as a liability of the owners of these shares, and like any other just and proper liability can never be gotten rid of *legally, fairly or honorably* except by its *payment.*

This is an axiomatic doctrine of morals, as well as of law, which it ought not to be necessary to insist upon in any litigation with banks or their shareholders; for there is no class of persons in any State who should be more punctilious in maintaining, by practice and example, as well as by precept, the duty of the prompt and cheerful performance of every pecuniary obligation, and particularly of promptly paying the debts, in the shape of just and moderate taxes such as those levied upon bank shares by Virginia will be found to be, due the State which safeguards and protects their interests.

If the radical and extraordinary contention of the appellant in this cause is sustained, its shareholders will forever go scot

free from the payment of any taxes to the State from 1890 to 1896, and indeed for all the time from 1890 to the present year.

Accordingly, the shareholders of several of the national banks, as appears from this record, having failed to pay the taxes due by them to the State, the General Assembly of Virginia passed the act approved March 3d, 1896, which is as follows:

Act No. 1, of March 3, 1896.

(Acts of the General Assembly of Virginia, Session 1895-'6, Chapter 642, page 700.)

"CHAP. 642.—An ACT to authorize and empower the Auditor of Public Accounts to collect taxes heretofore assessed upon bank stock held by resident and non-resident stockholders.

Approved March 3, 1896.

"1. Be it enacted by the General Assembly of Virginia, That the holders of bank stock or the stock of any banking association doing business in this State, resident and non-resident, shall be assessed with the tax imposed thereon by law in the city, town or district wherein the bank or banking association is located, and said tax shall be the first lien upon said stock, no matter in whose hands found, and have priority over any and all liens by deed of trust, mortgage, bill of sale, or other assignment made by the owner, and take priority over all liens by execution, garnishment, or attachment process.

"2. It shall be the duty of the Auditor of Public Accounts, as soon as practicable after the passage of this act, to furnish the cashier of the banks or banking associations doing business in this State with a list of its stockholders heretofore assessed with taxes upon their bank stock who have not paid said tax, which list shall give the name of the stockholder, amount of tax, when assessed, and the

sum total due to the Commonwealth by each stockholder. The bank or banking association thus notified, should said bank or banking association so desire and elect, may pay to the Auditor the tax assessed upon the stock held by its stockholders; provided, payment shall be made on or before the first day of July, eighteen hundred and ninety-six.

"3. But should the privilege conferred by the preceding section be declined or not availed of by the bank or banking association aforesaid, then it shall be the duty of the Auditor without delay to notify the Attorney-General and give him a copy of the lists furnished the cashier of the bank or banking association aforesaid, and the Attorney-General, by motion, shall proceed to collect said taxes from the individual stockholder. This motion shall be cognizable by and made in the Circuit Court of Richmond city after ten days' notice to the stockholder, and may be served upon non-resident defendants in the mode provided by section thirty-two hundred and eight of the Code of Virginia.

"4. This act shall be in force from its passage."

And, at the same time, the Virginia Legislature passed an act amending and re-enacting section 17 of the tax law of March 6, 1890. This act was approved on the same day with the statute just quoted, and is as follows:

Act No. 2, of March 3, 1896.

(Acts of the General Assembly of Virginia, Session 1895-'6, Chapter 669, pp. 726, 727, 728.)

"CHAP. 669.—An ACT to amend and re-enact section 17 of an act entitled an act to provide for the assessment of taxes on persons, property, and incomes, and on licenses to transact business, and imposing taxes thereon for the support of the government and public free schools and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required, approved March 6, 1890.

Approved March 3, 1896.

"1. Be it enacted by the General Assembly of Virginia, That section seventeen of the act entitled an act to provide for the assessment of taxes on persons and property and incomes, and on licenses to transact business, and imposing taxes thereon for the support of government and public free schools and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required, approved March sixth, eighteen hundred and ninety, be amended and re-enacted to read as follows—namely:

"§ 17. *Taxes on banks.*—No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but the stockholders in such bank or banking associations shall be assessed and taxed on the market value of their shares of stock therein at the same rate that is assessed upon other moneyed capital in the hands of individuals residing in this State. Each bank or banking association aforesaid, on the first day of February in each year, shall make up and return to the commissioner of the revenue

of the county, city, town, or district in which said bank or banking association is located a report, in which shall be given the names of the stockholders, the number of shares owned or held or controlled by each, the market value of said stock, and the stockholder's residence. It shall be the duty of said commissioner of the revenue, on or after the first day of February, in each year, to assess each stockholder upon the shares of stock estimated at the market value on said first day of February in each year a tax of thirty cents on every hundred dollars' value thereof; the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars' value thereof, which shall be applied to the support of the public free schools of the State and make out three assessment lists, give one to the bank or banking association aforesaid, located in his county, city, town, or district, and one to the Auditor of Public Accounts, and retain one. The assessment list delivered to said bank or banking association shall be notice to the bank or banking association of the tax assessed against its stockholders, and each of them, and have the legal effect and force of a summons upon suggestion formally issued and regularly served. The tax assessed upon each stockholder in said bank or banking association shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, no matter in whose possession found, and have priority over any and all liens by deed of trust mortgage, bill of sale, or other assignment made by the owner or holder, and take priority over all liens by execution, garnishment or attachment process sued out by creditors of the stockholder. The bank or banking association shall hold the dividend or other fund which belongs to the stockholder and in its custody at the time the assessment list is received, or that thereafter shall come under its control, for the use of the Commonwealth, and apply the same to the payment of the tax assessed, and when thus applied shall be acquitted and

discharged from all liability to the stockholder for the money thus disbursed; provided, that after making report to the commissioner of the revenue any bank or banking institution, on or before the first day of June in each year, which shall so elect, may pay the taxes assessed against the stockholders directly to the Auditor of Public Accounts. But should said bank or banking association fail to elect and pay into the Treasury the tax assessed against its stockholders on or before the first day of June in each year, then as soon thereafter as practicable the Auditor of Public Accounts shall transmit to the treasurer of the county or city in which said bank or banking association is located a copy of the assessment list furnished him by the commissioner of the revenue, and it shall be said treasurer's duty to collect the taxes therein assessed, and to this end levy upon the stock of the tax-payer, or so much thereof as is necessary to pay said tax, and sell the same at public auction for cash, as other chattels and personal property are sold under execution. He shall give to the purchaser a bill of sale made under his hand and seal. The bank or banking association in which such bank stock stands, on presentation by the purchaser of his bill of sale, shall cause the stock therein described to be transferred to said purchaser, and he shall take a clear and unencumbered title to the stock purchased. Should the taxes assessed against bank stockholders evidenced by the bids aforesaid be not paid or collected as hereinbefore provided, the lists aforesaid shall stand and be treated and have the legal effect of tax-tickets regularly made out against each of said stockholders named in said lists as to which tax the right of levy and distress had accrued to the Commonwealth, and the treasurer shall proceed to collect the same by levy or distress, and possess all and singular the authority and power conferred upon him by law to collect other State taxes, and be governed by sections six hundred and twenty-two and six hundred and twenty-three of the Code of Virginia. The bank or banking association which

shall fail or neglect to comply with each and every provision of this act for each separate offence shall be fined not less than one hundred nor more than five hundred dollars, which fine shall be recovered upon motion, after five days' notice, in the county, circuit, corporation, or hustings court of the county, city or district in which the said bank or banking association is located. Said motion shall be in the name of the Commonwealth and presented by the attorney for the Commonwealth of the court in which the motion is brought or made. The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed.

"2. This act shall be in force from its passage."

A brief examination, together, of the three acts of March 6, 1890, and Nos. 1 and 2 of March 3, 1896, is rendered necessary by the misapprehension of their effect and their manifest purpose exhibited by the appellant and its counsel.

They are utterly mistaken in supposing that the clause of the act of March 6, 1890, providing for a suit against the cashier and his sureties if default was made in the payment of the tax imposed by that act, was any longer a subsisting provision of the law of the State after March 3, 1896.

Act No. 1 of March 3, 1896, embodied legislation which covered, and was clearly intended to cover, the entire subject dealt with by the inadequate and invalid clause of the former act, as to the remedy to be pursued for the collection of the tax. It was plainly designed by the Legislature to supply the defects of the act of 1890 in this regard, and *ex vi termini*, its provisions were exclusive and operated as a repeal of so much of the prior enactment as was inconsistent with them.

Appellant's counsel have also fallen into error in their contention that Act No. 1 of March 3, 1896, was designed to "create a cumulative remedy for taxes assessed under" the act of March 6, 1890.

It was clearly intended to give a *substituted*, and an *exclusive*, remedy in the place of the abortive one prescribed in the

former act. The two acts are, in this regard, radically *repugnant to each other.* They present the precise conditions laid down by Mr. Sutherland, and quoted at page 14 of brief of appellant—viz:

"An implied repeal results from some enactment, the terms and necessary operation of which cannot be harmonized with the terms and effect of an earlier act. In other words, one must be repugnant to the other *so that both cannot be operative.*"

Sutherland on Statutory Construction, Sec. 138, p. 179.

What is conclusive of the question is that these two acts, in respect to the remedy prescribed for the collection of the tax, come fully within the rules as to implied repeal established by the highest court of Virginia, and which (these being Virginia statutes) control in the determination of their effect.

In the leading case of *Fox's Adm'r* v. *Commonwealth,* (16 Gratt., 8-11), which has been repeatedly approved in later decisions, Judge Moncure, speaking for the court, states, among others almost as pertinent, the following to be rules of construction in such cases:

"'Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto; for *leges posteriores, priores contrariant abrogant;*'" quoting from *Dwarris,* 673 (9 Law Lib.). See last paragraph, page 8, 16 Gratt.

And, at page 11 of the same volume, that great judge, speaking for the court in the same case, adopts the rule as laid down in *Sedgwick on St. and Con. Law,* as follows:

> "After stating it to be well settled that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms, the author says: 'And even if the subsequent statute be not repugnant in its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act.'" (See 16 Gratt., 11.)

But, if there could be any possible question as to the repeal of the part of the act of 1890 prescribing the remedy to be adopted, it is forever disposed of by act No. 2 of March 3, 1896, which expressly amends and re-enacts the former statute, and, in so far as its provisions are inconsistent with its terms, supplants and abrogates them.

So that, the zealous counsel have wasted much space and denunciation upon a provision of the State law which had not only, as we have seen, been a "dead letter" from the day of its enactment, but had been actually blotted from the statute books some months before their suit attacking it was brought.

Appellant, in its bill, and its counsel, in their generally very perspicuous and always vigorous argument of this case, have failed to properly distinguish act No. 1 from act No. 2 of March 3, 1896.

Time and space have been consumed in unmerited criticism of those two acts; and the facts that both were introduced into the Legislature on the same day, by the same patron, and afterwards passed on the same day, are dwelt upon as though they were in some way *indicia* of some intended wrong.

All of this is a phantom of the imagination, which would have been dispelled by a careful reading of the two acts.

They were companion measures, but each was designed to accomplish a proper, but very different purpose, as to the remedy prescribed.

Act No. 1, as will be seen from the language of its title and of section 2 of the act, was designed to give the banks, or their shareholders, another opportunity, *without charge of interest or penalty*, to pay the arrears of taxes due upon the banks' shares for the five preceding years; and, if this opportunity should not be availed of by July first of the same year, then suits were to be brought against each delinquent stockholder, as prescribed in section 3 of the act.

The remedy provided by this statute applied exclusively to the taxes *theretofore* assessed.

Act No. 2 of March 3, 1896, had a very different and sepa-

rate purpose, object and subject. It related entirely to taxes *thereafter* to be assessed.

It continued the levy of the tax in the same language of the act of 1890, but it prescribed a different mode of assessment, and a different procedure for its collection, from that provided either in the act of 1890 or in act No. 1 of March 3, 1896.

It is well to keep these distinctions well in mind.

If these two acts had been duly differentiated by the appellant in its bills, and by its counsel in the court below, it would have been made manifest that its bills were multifarious, in that they undertake to join two diverse causes of action—one an attack upon act No. 1 of March 3, 1896, which related only to taxes accrued prior to its passage, and the other an attack on a very different statute, act No. 2 of March 3, 1896, involving largely variant questions and the rights and interests of different parties from those arising under or affected by act No. 1.

Not having been counsel in this cause in the court below, I do not know whether this objection was ever made there. As a rule, I know it is too late to make such an objection in this court unless it was raised in the lower court; but the court may, of its own motion, in such a case, dismiss a bill for misjoinder of causes of action so distinct and severable.

1. Foster Fed. Prac., Secs. 71 and 108.

I do not ask this, however, for it is best for all parties concerned that the case shall not be decided upon any such narrow ground, however well founded it may be.

I only mention it because I desire the court to bear in mind that this is really two suits in one, and to carefully discriminate between the alleged cause of action under act No. 1 of March 3, 1896, and the one alleged under act No. 2 of March 3, 1896.

I beg leave now to notice succinctly some of the objections urged by appellant's counsel to these two acts:

Act No. 1 is criticised because it is charged that the lien

given by the first section thereof is retroactive and therefore invalid.

Upon a careful reading of section 1 of this act, it will be seen that its provisions are in no sense retroactive. Both in respect to the general provision relating to the assessment of bank shares, and the lien given for the taxes levied upon them, the intent and effect of the section is distinctly prospective in its operation. It only undertakes to create a lien for any taxes due from the date of its enactment, or from the date when such taxes shall be assessed. It can only be fairly construed to operate *in presenti* and *in futuro*.

It is too well settled that a State legislature has a right to create such lien for taxes due the State, to require any citation of authority, and I feel sure that the proposition will not be controverted here.

Any attempt to make such a lien retroactive, so as to interfere with any vested rights of others, would have been a nullity under the decisions of the Virginia courts, as well as under the rulings of this court.

Merchants Bank of Danville v. *Ballou*, 98 Va., 112.

In the case just cited, it was settled as the established law of Virginia: First, that a statute would not be construed as having a retroactive effect, unless this was manifestly the unquestionable purpose of the Legislature; second, that any retroactive act, which interfered with vested rights, as with the priority of a valid subsisting lien on real estate, would be unconstitutional and a nullity.

But, even if the act was retroactive, how could that be any matter of interest to this bank? How would it affect the interest of any person except some one who already had a valid lien upon the bank shares? What right has this appellant to be raising any such question?

The fact is that the bank here is, in this matter, and as to the main question in this litigation, a volunteer, without right or interest or standing to maintain this suit.

Another objection earnestly urged against act No. 1 of March 3, 1896, is that its third section is unconstitutional, because it provides for suits against non-resident defendants, just as is provided in respect to such suits by individual suitors, by notice by publication under section 3208 of the Code of Virginia.

The statute nowhere provides that there may be a personal judgment against a non-resident defendant without personal service against him within the State.

It does not, and could not have done such an illegality. It did not undertake to do the idle and useless thing of attempting to give the Virginia courts extra-territorial jurisdiction.

Under the law of Virginia, as emphatically and finally settled by repeated decisions of her highest court, such an attempt would have been an act of folly and an absolute nullity. This was established by the decisions of the Supreme Court of Appeals of Virginia in *Hopkirk* v. *Bridges*, 4 Hen. & Munf., 413; *Roote's Ex'r.* v. *Tompkins, Trustee*, 3 Gratt., 94; *Obrien and others* v. *Stephens*, 11 Gratt., 610; and in the interesting case of *Gray and others* v. *Stuart and others*, 33 Gratt., 358-359; and by other cases in full accord therewith.

The statutes of Virginia must be read in the light of the decisions of her highest courts as to their meaning and effect.

My learned friends will concede that no personal judgment can, under Virginia law, be recovered under that act against any defendant who has not been served with process or notice in this State, or entered an appearance in the suit; but his property, and particularly his delinquent shares of bank stock, could be proceeded against by attachment, and judgment *in rem* entered, upon proper proofs, for the sale of such property under the attachment laws of Virginia.

But all of this is not any matter of interest to the appellant in this suit.

Nor was it necessary or proper, for any party in interest, in order to obtain full protection and to establish a complete defence against any unconstitutional provision or remedy, had any such been embodied in said act, to invoke the jurisdiction of a court of equity by injunction or otherwise.

It cannot be denied that such defence could be made against any provision or procedure, in violation of the shareholders' rights, as well, or better, at law, than it could be availed of by them in any proper suit in equity.

To any suit brought under said act, the shareholder could make defence on the ground of any unconstitutionality in the provisions of the act; and, if his defence was disallowed, he could carry the case to the highest court of the State, and to this court.

So, again, we find that there was no justification for this suit.

Now, as to act No. 2 of March 3, 1896, I will only say here, that its provisions are not arbitrary in their operation or effect; that they go no further than the acts of other States, repeatedly approved by the decisions of this court; and that they come within the rule as finally laid down by this court in the case of *First Nat'l Bank of Wellington* v. *Chapman*, 173 U. S., 205. Until that case shall be overruled, act No. 2 of March 3, 1896, must stand.

But how has the bank any status to maintain this suit, even if all the hard things it said about that act were true?

No proceeding had been instituted or threatened, to hold it liable for any of the taxes due by any of its stockholders; and it cannot, under the statutes and decisions of the courts of Virginia, any more than under the Federal statutes and adjudications, be held to any liability not sanctioned by the State and Federal Constitutions.

It has no conceivable interest in the subject matter of the controversy. It occupies no position of responsibility in respect to its result; and no fiduciary relationship to its shareholders, as was the case in *Cummings* v. *National Bank*, 101 U. S., 153. And, because of this, the judge of the court below would have been clearly right in dismissing the complainant's bill, if there had been no other objection to it.

Puget Sound Nat'l Bank of Seattle v. *Kings County*, 57 Fed. Rep., 433.

The shareholders themselves—the only parties in interest adversely to the State—are indispensable parties to such litigation, because it would be impossible to give complete or adequate relief unless they were before the court and bound by its decree.

"All persons who have any substantial legal or beneficial interest in the subject matter of the litigation, and who are materially affected by the decree which may be rendered, must be made parties," is the rule laid down by Mr. Barbour.

See *Barbour on Parties*, p. 326.

> "All persons, materially interested in the subject of a suit, ought to be made plaintiffs or defendants, however numerous they may be, in order to prevent multiplicity of suits, and that there may be a complete final decree between all parties interested."
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> *Barbour on Parties*, p. 326.
> *Mitf. Eq. Pl.*, p. 144.
> *Story's Eq. Pl.*, 76 *a*.

I know that a rule more liberal in this regard has been adopted from necessity by the Federal courts, pursuant to section 737 of the Revised Statutes; but I challenge the learned counsel for the appellant to produce a case from the Federal courts, or from any court of any civilized jurisprudence on earth, in which it has been held that the courts would entertain a suit brought by a party who had no interest in the controversy, and in which none of the persons, having any real interest adverse to that of the principal litigants defendant, were brought before the court either as plaintiffs or defendants.

In *Davenport* v. *Dows*, 18 Wall., 526, this court held that a corporation is a necessary and indispensable party to a suit brought by stockholders to restrain illegal taxation of such corporation. The stockholders had a vital interest in the litigation in that case, for they were the beneficial ultimate owners of the property of the corporation, and yet the corporation, be-

ing the person taxed, had a direct interest in the subject matter of the controversy, and was held to be a necessary party to the suit.

A fortiori, the stockholders, whose shares are unduly taxed, are indispensable parties to any suit brought by the corporation to enjoin illegal taxation of their shares; for the corporation does not own the shares of its stockholders, nor is it any matter of interest to the corporation to whom those shares belong, nor what charges or liens are imposed upon them, provided these charges do not in some way involve the corporation in liability, or interfere with the regular and legal transfer and representation of such shares.

The bank *may* be a *proper* party to such litigation. The shareholders are *absolutely necessary* parties.

The prevention of a multiplicity of suits is not a ground for sustaining a suit in equity where no other ground for equitable relief is presented; and the fact that each of these parties has made himself liable to a separate proceeding against him to collect the taxes he owes, furnishes no justification for the interposition of a court of equity at the suit of the bank, or even at the suit of the shareholders in a case like this.

The rule governing the subject is stated by Judge Cooley.

See *Cooley on Taxation,* pp. 769-771.

The reasoning of the Supreme Court of Connecticut, in *Dodd* v. *Hartford,* cited by Judge Cooley at page 771, applies with great force to this case:

"The multiplicity of suits, which the petition seeks to avoid, does not injuriously affect any one of the petitioners. No one of them has any occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear, and the object of this bill would seem to be to relieve these parties severally from that one suit, and to consolidate the apprehended litigation. In other words, to enforce the consolidation rule by means of the extraordinary powers of the court of chancery. If the assessment were against one person only,

it is not claimed that he could transfer from a court of law to a court of equity the question of his liability. But how is the condition of any one of these petitioners the worse because others are assessed for the same improvement? It would undoubtedly be convenient to try the questions relating to these warrants in one comprehensive law suit. But it does not seem to the court that the case presented by the bill is one of such irreparable injury, or of inadequate relief at law, as to warrant us in taking it away from the legal tribunals."

(*Dodd* v. *Hartford*, 25 Conn., 232, 238.).

Second. The suit of the appellant should not have been entertained by the court below, because at the outset it violates the primal principle of equity. "He that will have equity done to him, must do it to the same person."

We are indebted to the appellant for furnishing us with its bill the valuable and instructive exhibits found at pages 31-65 of record. These exhibits show the market value of the stock from year to year, and the deductions claimed by each individual shareholder from the aggregate value of his holdings on account of his individual indebtedness.

On page 35 of record, it will be seen that the aggregate market value of the shares of this bank for the year 1891 was $273,049, and the aggregate of deductions claimed by shareholders, $45,553; leaving, *after making these deductions*, the net value of the shares for that year, $227,496.

At page 40 it will be seen that the aggregate market value of the shares for 1892 was $273,043. The deductions aggregate $54,044; leaving the value of the shares liable to taxation after taking off deductions claimed on account of indebtedness, $218,999. And so on, with slightly variant results, until the year 1897, reported at page 65 of record, when we find the ag-

gregate market value of the shares to be $287,420, and the deductions claimed on account of the indebtedness of the individual shareholders, $56,225; leaving the aggregate value of the shares liable to taxation upon that showing, for that year, at the sum of $231,195.

Now, without the payment of the large sum justly and unquestionably, upon its own showing, due upon these shares of stock, this bank has come into the Circuit Court of the United States for the Eastern District of Virginia, and has obtained an injunction, by which the State of Virginia has been, for years, held up from collecting a dollar of taxes, not only from those shareholders who claim deductions, but from the great majority, in value and number, of the shareholders who could set up, and did set up, no such claim.

"The mode of relief where an illegal assessment of national bank shares has been made, is *upon the payment of so much of the tax as is legal*, to enjoin the collection of the residue."

This is the practice approved in *Cummings* v. *National Bank*, 101 U. S., 153, but has been disregarded in this suit. See syllabus of that case.

See, also, *I. Desty on Taxation*, last sentence on page 387, where that learned author says:

"In such case, *on the payment or the tender of the sum which such shares ought to pay*, under the rule established by that act (Sec. 5219 of Revised Statutes), a court of equity will enjoin the State authorities from collecting the remainder," citing *St. Louis Nat'l Bank* v. *Papin*, 4 Dill., 29.

Here, by reason of what I respectfully submit has operated and is operating as an abuse of the process of the court, the State of Virginia has been held up from the collection of her taxes on over $200,000 of property of the stockholders of this bank, against which taxes there can be no just or possible legal claim of any deduction upon any account, from the year 1891 to the present time.

In other words, as a result of this suit, brought by the bank, in order to secure what is alleged to be rightful deductions for the benefit of a few of its shareholders who made claim thereto,

the great majority of its stockholders, who have no such claim and make no pretence thereto, and who had paid no State taxes after January, 1891, have been unjustly shielded from the performance of this important duty of citizenship, since the 22d of July, 1896.

Such has been the practical working of this suit, and no stronger argument could be presented than it furnishes for denial by the courts of such relief in any such case.

Third. Because, if there is anything in the contention of the appellant that the shares of stock of said bank have been subjected to taxation by the officers of the State charged with the duty of assessing and collecting such taxes, "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the State of Virginia, there was and is an ample remedy at law, by MANDAMUS, for the redress of any such alleged wrong.

The learned counsel for the appellant seem to close their eyes to the fact that the tax laws of Virginia of which they complain—both that of March 6, 1890, and that of March 3, 1896—expressly and *in ipsissimis verbis* of the act of Congress (Sec. 5219 of Revised Statutes) *impose no greater and no other taxation* upon the shares of national banks than that which is assessed "upon other moneyed capital in the hands of individual citizens" of Virginia—and this, though this very identical language from the statute of Virginia is quoted twice in their bill and three times in the very able and exhaustive opening brief filed by them in this matter.

The Federal statute in question is in the following words:

> "Section 5219. Nothing herein shall prevent all the shares in any association from being included in the valua-

tion of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located, but the Legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to two restrictions. (a) That the taxation shall not be a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and (b) that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

If the words of this section, providing that the taxation of national bank shares by the State shall not be "at a greater rate that is assessed upon other moneyed capital in the hands of individual citizens of such State," *entitle the owners* of such shares to all *deductions* accorded to "moneyed capital in the hands of individual citizens" of the State of Virginia, *then the same language in the Virginia statutes*, which impose a tax upon the shares of all banks and banking associations, both State and national, *entitles the holders of such shares to precisely the same deductions.*

The learned counsel are strangely mistaken in assuming that the Virginia statutes are in contravention of the act of Congress (Sec. 5219 of Revised Statutes).

Neither the Virginia act of March 6, 1890, nor that of March 3, 1896, conflicts in any particular with the Federal statute referred to; but both are in strict conformity with and obedient to the act of Congress, which the General Assembly of Virginia has thus recognized as supreme.

All that was necessary for any stockholder of the Peoples National Bank of Lynchburg, or any shareholder of any other

bank, to do, if such bank has a right to maintain this suit, in order to secure proper deductions from the market value of the stock of such bank, to be accorded to the individual shareholders thereof, would have been to have resorted to the remedy by *mandamus*, to compel the commissioner of revenue of the city of Lynchburg, or rather the Auditor of Public Accounts at Richmond, to give each stockholder credit for such proper deduction upon the value of his shares.

In Virginia, as generally in this country, *mandamus* has ceased to be an extraordinary prerogative writ, but is a very simple, summary, and effective remedy at law.

By the Virginia statute, the proceeding has been simplified, and it has become the most satisfactory and effective remedy for relief in just such cases as appellant's counsel claim this to be.

See chapter 144, *Code of Virginia*, 1887.

The application can be made directly to the Supreme Court of Appeals of the State; and here, the questions raised in this case by a party who has no interest in their determination, could have been raised at the suits of one or two or three stockholders, and finally settled in a summary and inexpensive and entirely satisfactory manner, six or seven years ago.

In like manner, the shareholders, or the bank, if it had a right to maintain this suit, could, if there had been any violation of any Federal statute, have proceeded by *mandamus* in the Federal court at Richmond.

That *mandamus* is a proper and appropriate remedy in such case, see *High on Extraordinary Legal Remedies*, sections 87, 137-140.

At section 140, Mr. High says: "And it has been held that the writ might be granted against assessors who had improperly assessed shares of bank stock owned by the relator, to require them to cancel or to correct the assessment," citing *People* v. *Assessors of Barton*, 44 Barb., 148, and *People* v. *Olmstead*, 45 Barb., 644.

Here there is no claim that there has been overvaluation of

the stock or excessive assessment of the value of the stock; but the only contention is that there should be deductions from its market value as assessed against the individual shareholders; *first*, of the value of the real estate of the bank, otherwise taxed; and, *second*, of the amount of debts or liabilities due by the individual holders of the shares, respectively.

The record shows precisely what these deductions would be. The assessed value of the real estate is given in the bill, and is given upon the land books in the Auditor's office, and the deductions claimed on account of the individual indebtedness of the shareholders, respectively, are shown in the exhibits, pages 31-65 of record. And, if the shareholders are entitled to any such deductions, they could be secured to them readily by *mandamus* against the commissioner of revenue for the city of Lynchburg, or against him and the Auditor of Public Accounts.

As to any deduction on account of the taxation of the real estate of the bank, we shall see presently that there is no possible ground for any such claim.

There is thus no Federal question presented in this case, for the State law conforms distinctly to the act of Congress.

Having thus considered the grounds above stated, upon which the court below was compelled to sustain the demurrer in this cause, I shall now proceed to discuss the case more particularly upon its merits.

THE TAX LAWS OF VIRGINIA, IN QUESTION, DO NOT DISCRIMINATE AGAINST THE HOLDERS OF SHARES OF THE CAPITAL STOCK OF NATIONAL BANKS IN FAVOR OF "OTHER MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS" OF VIRGINIA, WITHIN THE MEANING OF SECTION 5219 OF UNITED STATES REVISED STATUTES.

It will be observed that the taxation by Virginia of said shares of stock is *assailed* by the appellant *upon two* (2) *grounds* only:

First, That there is unlawful discrimination, in that the real estate of the bank is specifically assessed and taxed by the State, and that, inasmuch as this real estate constitutes an asset of the bank, and is thus an element in the valuation of the shares of its stock, the result will be double taxation to the extent of the assessed value of the real estate, if both it and the shares are taxed by the State; and,

Second, That there is discrimination under the tax laws of the State against the shares of the stock of national banks, in that the owners of such shares are not permitted to deduct from the value of their shares the amount of their *bona fide* indebtedness to others.

1. *A very brief statement will suffice to dispose of the first objection to the Virginia tax laws.*

By the express terms of section 5219 of Revised Statutes, the power of the State Legislature in respect to the taxation of national bank shares is absolute, except that they must be taxed in the city or town where the bank is located, and that they shall not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State; and the only limitation upon the power of the State

Legislature to tax the real estate of national banks is, that it can only be taxed "to the same extent, according to its value, as other real property is taxed."

Now, it is clear that the Virginia tax upon the real estate of national banks cannot be in contravention of this Federal statute, *unless there is some discrimination by the State*, in its tax laws, in respect to real estate owned by individual citizens of the State who are the possessors of moneyed capital, or unless the real estate of national banks is not taxed by the State "to the same extent, according to its value, as other real property is taxed."

The tax laws of Virginia furnish an irrefutable negative to the contention of the appellant's counsel as to the invalidity of the tax levied by Virginia upon the appellant's real estate.

The laws of Virginia, from time immemorial—indeed, from the early colonial eras of the Commonwealth to the present time—have always *levied a tax upon all real estate* within the State, except such as is used exclusively for religious, public or charitable purposes.

A tax was levied upon real estate in Virginia as far back as the year 1755.

On page 463, *Sixth Hening's Statutes at Large*, (28th George II.), it is provided as follows:

> "VI. *Be it further enacted by the authority aforesaid*, That the sum of two shillings shall be paid for every tithable negroe, mulatto, or Indian slave, within this colony, by the owner or proprietor thereof, to the sheriff of the county wherein such tithables are inlisted, on or before the tenth day of April, next ensuing.
>
> "And that the sum of one shilling and three pence for every hundred acres of land, and so proportionably for a greater or lesser quantity, shall be paid by the owner and proprietor thereof, on the same tenth day of April, to the sheriff of the county where such lands lie, and to be collected by and according to the rent rolls delivered to the

sheriffs, respectively, for the collection of his Majesty's quit-rents. * * * "

There is no exemption, no deduction, no abatement allowed in Virginia in favor of any owner of real estate. Even if there is a mortgage upon it to its full value, nevertheless the nominal owner must pay the full tax upon its assessed value, without deduction. If it be held by a purchaser who owes for it the entire purchase money, still he must pay the entire tax upon the full assessed value. There is not only no deduction or abatement allowed in favor of citizens of the State who are the possessors of moneyed capital; but there is no abatement in favor of any citizens of the State or any corporation. All are taxed alike upon their real estate, and to precisely the same extent and in the same manner that taxes are levied upon the real estate of national banks. I am sure that this statement will not be controverted, because it is absolutely in accordance with the fact.

Section 2 of the tax law of the State, which is the only statute imposing a tax upon lands, has been for many years as follows:

"*Taxes on lands and lots.*

"On tracts of lands and lots and the improvements thereon not exempt from taxation, there shall be a tax of thirty cents on every hundred dollars of the assessed value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars of the assessed value thereof, which shall be applied to the support of the public free schools of the State."

The only exemptions which were permissible under the Constitution of Virginia during the period of this litigation, were those specified in section 3, Article X. of the then Constitution of the State:

"Sec. 3. The Legislature may exempt all property used ex-

clusively for State, county, municipal, benevolent, charitable, educational, and religious purposes."

All other property in the State, whether it be real estate, or capital invested, or loans made, or evidences of debt, whether invested, or due by persons within or without this State, must be taxed.

2. *The Virginia tax laws do not discriminate in any way against the owners of shares in national banks in favor of other moneyed capital in the hands of individual citizens of the State; and particularly, they do not discriminate in favor of such moneyed capital, in the matter of allowing from the valuation thereof deductions on account of the personal indebtedness of the owners of such moneyed capital; and any statement to the contrary is contradicted by the express terms of the Virginia tax laws.*

I realize that if I am correct in this proposition, it will be conclusive of this litigation. That I am correct, I think will abundantly appear from a consideration of the Virginia tax laws in the light of repeated final adjudications of this court in similar cases.

An examination of the tax laws of Virginia must satisfy any impartial mind that there is not now, and never has been any purpose on the part of the State Legislature to discriminate against the owners of shares of banking companies.

The policy of the State, and the system of taxation she has embodied in her laws, were adopted long before the enactment of Sec. 5219 of the United States Revised Statutes, and without any reference to national banks.

I do not claim that those tax laws are by any means in all cases equal or absolutely just in their operation. In some cases it may be fairly claimed that they are exceedingly un-

equal, in the burdens which they impose upon the tax-payers. But no system of taxation has yet been devised by the legislative mind which does not contain provisions which operate unequally, and sometimes unjustly.

In the *Railroad Tax Cases*, 92 U. S., 612, Mr. Justice Miller said: "Perfect equality of taxation is a dream unrealized." He might have said, with equal truth, it is an "*iridescent dream.*"

But, while there have been inequalities and discriminations in the tax laws of Virginia, there have been none that were, in purpose or in effect, inimical to the holders of shares of stock in national banks.

The policy of Virginia has been to levy identically the same tax upon every species of tangible property, and upon every representative of intangible property, without allowing any deductions or abatements whatever. All real estate, and all tangible personal property, is taxed at the same rate. The owner may be insolvent absolutely, and yet he or his property must pay the full tax assessed upon it.

No deduction is allowed as in the former New York statute, reviewed in the leading case of *People* v. *Weaver*, 100 U. S., 539, where the tax-payer was taxed on "*the value of the personal estate owned by him, after deducting his just debts.*"

Not only was every article of tangible property so taxed by Virginia; but, *until a difference was made in favor of banking associations, State and national*, the shares of all incorporated companies were taxed in the hands of the individual shareholders, at their full value, without abatement or deduction, whether it was a financial or an industrial company; *and*, at the same time, *all the real estate* of the corporation was taxed, *and*, in addition to that *all the capital* of the corporation was taxed. So that, in some cases, the tax laws operated to impose triple taxation; as, for instance, where a substantial portion of the property of the corporation consisted of real estate, it was taxed upon that real estate at its full assessed value, again it was taxed upon its capital, and then again each shareholder was taxed upon the full value of his shares. And

this taxation was held to be constitutional more than once by the Supreme Court of Appeals of Virginia, and last, in the case of *Allen* v. *Commonwealth* and *Jennings* v. *Commonwealth*, 98 Va., 80.

The policy of Virginia has been to tax each *entity* separately, and without deduction. The real estate and tangible personal property of the corporation were treated as distance entities. Its capital was treated as a distinct entity; and the shares of its stock were treated and taxed as substantive distinct entities; a principle which has been sanctioned by this court.

The only case, as will be seen from a copy of the statute which will be annexed to this brief, *in which the capital of any corporation was by the Virginia tax laws exempted from taxation during the period of this litigation, was in the case of banks and banking associations, whether national or State,* The capital of all insurance companies, of all manufacturing companies, of all guaranty companies, of all trust companies, was taxed at its full value, as ascertained by the assessing officers of the State, and, at the same time, the shares of the capital stock of all of these companies were, until 1900, taxed at their full value in the hands of the individual stockholder.

I wish this court to observe that *the only exemption* to this exacting, unequal, but not unconstitutional, system of taxation *was made in favor of banking associations and the holders of the shares of such institutions.* So that, *instead of* there having been any *discrimination* made by Virginia *against* property of this description, *her laws*, during all the years covered by this litigation, have distinctly *discriminated in favor* of the shares of banking institutions.

Trust companies, as they exist and do business in Virginia, have been, and still are, as to a large proportion of their business, practically banking institutions, receiving moneys on deposit, lending money upon negotiable paper, and conducting what is practically to all intents and purposes a banking business, and one in respect to which they and the State banks and national banks are reciprocally competitors of each other. And yet, the real estate *and the capital* of all trust companies were,

until 1903, subjects of taxation, at the full assessed value in Virginia; and, at the same time, all the shares of their stock, held by residents of the State, were subject to taxation at their full value.

Since the adoption of the Constitution of 1902, trust companies and all banking associations have been placed upon the same footing in respect to taxation and in respect to the deduction of the value of their real estate, otherwise taxed in this State, in the ascertainment of the assessed value of the shares of stock in such companies; but that is done pursuant to the express provision of section 182 of the Constitution of Virginia (1902).

Before proceeding to consider the precise terms of the Virginia tax laws in question, in connection with section 5219 of Revised Statutes, it is necessary to determine exactly what is meant by "moneyed capital in the hands of individual citizens."

It is not difficult to find definitions of "money" and of "capital," but it is not easy to find a satisfactory definition of "moneyed capital."

The *Encyclopaedic Dictionary*, Vol. 3, p. 3178, defines it as "capital consisting of money."

The words, in fact, carry their import upon their face.

One of the best definitions that I have found of the term as used in section 5219 of Revised Statutes, is that given by the court in *Mercantile Nat'l Bank of Cleveland* v. *Shields*, 59 Fed. Rep., 952 (cited on page 36 of the opening brief of counsel for appellant), where it was held that the term "moneyed capital," as used here, means "money employed in a business whose object is to make profit by investing such money in securities, by way of loan, discount, or otherwise, which, from

time to time, in the course of business, are reduced again to money and reinvested."

In other words, it is MONEY—either cash in the hands of an individual, or invested by him and used by him in financial operations—as, for instance, capital invested in private banking, or invested in the business of "dealing in money or commercial representatives of money."

I shall not consume time in a review of the numerous decisions of this court upon this and cognate questions. A reference to a few of the leading and later decisions of this court will suffice, and will be conclusive for the purposes of this case.

Mercantile Bank v. *New York*, 121 U. S., 138, may be considered as the leading case upon the question. Mr. Justice Matthews, who delivered the exhaustive opinion of the court in that case, after reviewing the antecedent decisions, says:

> "The business of banking, as defined by law and custom, consists of the issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eye of this statute, 'moneyed capital.' Corporations and individuals, carrying on these operations, do come into competition with the business of national banks; *and capital in the hands of individuals, THUS EMPLOYED, is what is intended to be described by the act of Congress.*"

(121 U. S., 156.)

It is thus settled that the "moneyed capital in the hands of individual citizens," referred to, is *limited to money used in*

operations which "come into competition with the business of national banks."

And this view is further confirmed by this court in its opinion delivered by Mr. Justice Peckham in *First Nat'l Bk. of Garnett* v. *Ayers*, 160 U. S., 660, 666, where, citing the above case, it is stated that, "The main purpose of Congress in fixing limits of taxation on investments in shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring State institutions or individuals carrying on a similar business and operations and investments of like character."

In *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 440, 460, after reviewing previous decisions of the court, Mr. Justice Shiras, delivering the opinion, says:

> "The conclusions to be deduced from these decisions are, that money invested in corporations or in individual enterprises, that carry on the business of railroads, of manufacturing enterprises, mining investments, and *investments in mortgages*, does not come into competition with the business of national banks, and is not, therefore, within the meaning of the act of Congress."

And in the interesting case of *Nat'l Bk. of Wellington* v. *Chapman*, 173 U. S., 205, 214, (*a case which, I step aside to say, is upon the main question very similar to the case at bar, except that the case at bar is a stronger one for the appellee*), Mr. Justice Peckham, after reviewing the cases just referred to, says, in delivering the opinion of the court:

> "The result seems to be that *the term 'moneyed capital,'* as used in the Federal statute, *does not include capital which does not come in competition with the business of national banks*, and that exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the Federal statute."

Now, bearing in mind the rule thus finally established by the repeated adjudications of this court, let us look for a moment at the Virginia statute which my learned friends claim is in conflict with section 5219 of Revised Statutes.

The provisions of the Virginia law which they criticise, so far as they affect the question under discussion, have been the same for many years, and are substantially the same to-day that they were under the act of March 6, 1890.

The following are copies of sections 8 and 9 of the act of March 6, 1890, (Acts of 1889-1890, pp. 200-202):

"8. The classification and numbers under Schedule C shall be as follows—to-wit:

On personal property in choses in action, moneys, credits, and capital.

First. The commissioner shall require each person residing in his district, city, or town, to exhibit and make oath to a statement in the aggregate of all bonds, notes, and other evidences of debt due and payable to such persons, in excess of one hundred dollars, the amounts of such bonds, notes, and other evidences of debt under one hundred dollars each to be given under oath, in the aggregate, the solvency of which, in cases of doubt, as well as the value thereof, shall be determined by the said commissioner; which said list shall be signed by the commissioner and tax-payer, including bonds due from railroad and canal companies, bonds of counties, cities, and towns, and bonds of other States and corporations; demands and claims, however evidenced, owing or coming to such person, whether due or not, from debtors residing out of or within the State or county, whether secured by deed of trust or by judgment, or not, deducting from the aggregate amount thereof all such bonds, demands, or claims, not otherwise deducted, owing to others from such person as principal debtor, and not as guarantor, endorser, or surety. The aggregate of principal, interest, and ex-

change shall constitute the amount of a bond, demand, or claim due and payable; and the principal, with interest rebated when the amount of the bond, demand, or claim bears no interest, shall constitute the amount of the bond, demand or claim not yet due and payable. But no bond, demand, or claim constituting a part of the capital, as defined in chapter one of this act, of a business done out of this State shall be included in this section. If any person, firm, or banking association shall, with a view to evade the payment of taxes, fail or refuse to give into the commissioner of the revenue a statement of the aggregate of any bonds, notes, claims, or other evidences of debt which are subject to assessment and taxation under chapter one of this act, the same shall not be recoverable by action at law or suit in equity before any of the courts of this Commonwealth, legal process or sale, under deed of trust, until they shall have been reported for assessment and the tax paid thereon, with an addition of fifty per centum per annum from the time the tax accrued; and the failure to give in the aggregate of said bonds, notes, claims, and so forth, shall be taken as prima facie evidence of the intention to so evade the payment of taxes.

Second. He shall ascertain from each person in his district, city, or town the value of capital, including moneys, credits, or other thing remaining invested, whether said investment was made originally in this or any other State or country, and the value of all capital loaned, used, or employed in business out of this State by himself, his agent, or other person for him.

Third. He shall ascertain the value of all capital of incorporated joint stock companies not otherwise taxed; but real estate belonging to such company shall not be held to be capital, but shall be listed and taxed as property, and not as capital.

Fourth. He shall ascertain from each person in his dis-

trict, city, or town the amount of capital invested, used, or employed in any trade or business not otherwise taxed; moneys and credits actively used and employed in carrying on the trade or business, including goods, wares, and merchandise on hand, and all solvent bonds, demands, or claims made or contracted in the course of business during the preceding year shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be assessed and taxed as other specific property; but nothing herein shall be held to exclude from taxation any property which is the subject of such business.

Fifth. He shall ascertain from each person residing in his district, city, or town, the aggregate amount of money and the value of principal and interest of personal estate and credits under his control as court receiver or commissioner, in pursuance of any order, judgment, or decree of any court as agent, guardian, or other fiduciary. And it shall be the duty of the clerks of courts to furnish commissioners with a list of all evidences of debt under the control of courts, receivers, or commissioners, as evidenced by decrees of the courts.

Sixth. He shall ascertain the amount of any money and the value of any personal estate or credits deposited to the credit of any suit and not in the hands of a receiver.

Seventh. He shall ascertain the value of all toll-bridges, turnpikes, and ferries in his district other than steam ferries.

Eighth. He shall ascertain from each person residing in his district, city, or town all money belonging to him on deposit to the credit of such person with any bank, or other corporation, or firm, or person.

Taxes on personal property in choses in action, and so forth, and toll-bridges.

9. On all personal property in choses in action, and so forth, and toll-bridges, turnpikes, and ferries, and moneys

> in currency as embraced in this schedule, there shall be a tax of thirty cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the payment of expenses of the government, and a further tax of ten cents on every hundred dollars of the value thereof, which shall be applied to the support of the public free schools of this State."

An examination of the foregoing schedule will show that it defines the personal property in choses in action, moneys, credits and capital upon which a tax is levied, the mode of their assessment, and the deductions which shall be allowed. The only deductions which are allowed are from the evidences of debt mentioned in the first subdivision of section 8, which embraces "bonds, notes, and other evidences of debt," due and payable to the person to be assessed; and the securities to be included in the assessment are defined in this section to be "bonds due from railroad and canal companies, bonds of counties, cities, and towns, and bonds of other States and corporations; demands and claims, however, owing or coming to such person, whether due or not due from debtors residing out of or within the State or country (county), whether secured by deed of trust, or by judgment, or not"; from the aggregate amount of the value of which there may be deducted "all such bonds, demands or claims, not otherwise deducted, owing to others" from the tax-payer as "principal debtor, and not as guarantor, indorser or surety."

The subjects of taxation, or evidences of debt, from which deductions are allowed to be made, include mortgages and other like forms of investments, expressly sanctioned by this court in more than one case.

> *Aberdeen Bank* v. *Chehalis County*, 166 U. S., 460.
>
> *Natl. Bk. of Wellington* v. *Chapman*, 173 U. S., 214, and cases there cited.

They include all debts due for labor and services, all debts

due for the sale or lease or hire of all descriptions of real and personal property, evidenced by note or obligation in writing, and all "bonds, notes and other evidences of debt."

But they distinctly, and, as we shall presently see, purposely, *exclude all capital,* whether moneyed or otherwise, all "moneys, credits, or other thing remaining invested," and all money of the individual tax-payer, whether in his possession or on deposit.

The subjects from which a deduction of his personal indebtedness is permitted, even if section 8 of schedule "C" of the Virginia law stopped with the first clause thereof, *are far less extensive* than those of the former New York statute which this court held to be invalid in *People* v. *Weaver,* 100 U. S., 539, where the tax-payer was allowed to deduct his just debts from "the value of the personal estate owned by him."

They are *far less extensive* than those of the Indiana statute, reviewed and held to be in conflict with the Federal statute, in *Evansville Bank* v. *Britton,* 105 U. S., 322; because the Indiana statute allowed the deductions to be made from:

> "1. Credits or money at interest, either within or without the State, at par value;
>
> "2. All other demands against persons or bodies corporate, either within or without this State;
>
> "3. *Total amount of all credits.*"

This court, in the last-mentioned case, held in effect that the Indiana exemption *ex vi termini,* included every species of personal asset, and necessarily included all "moneyed capital in the hands of individual citizens" of said State.

And what ought to be conclusive of this case upon this point, if there was nothing else upon which the Commonwealth of Virginia could rely for her defence, is that the classification of the subjects of taxation from which deductions are allowed by the Virginia statute is *no more comprehensive* than those defined in the law of Ohio, reviewed, and the validity of which

is sustained by the unanimous decision of this court in *First Natl. Bk. of Wellington* v. *Chapman,* 173 U. S., 205.

The subjects from which a deduction could be made by the Ohio tax-payer are just as likely to include "moneyed capital in the hands of individual citizens" as are the subjects defined in the Virginia statute.

It appears that the aggregate value of the subjects assessed for taxation under the first subdivision of schedule "C" of the Virginia statute vary from about twenty-two to twenty-six million dollars. Upon the face of this clause of the statute, and upon the data furnished by the extracts from the Auditor's reports, filed as Exhibits Nos. 1 and 2 with the second amended bill (pages 68-69 of record), it does not appear that one dollar of "moneyed capital in the hands of individual citizens" has been assessed or taxed under that clause. It abundantly appears that a great majority of the subjects of taxation enumerated therein, from which deductions can be made on account of indebtedness, cannot, under the decisions of this court, be considered "moneyed capital." The classification made in the statute and the returns from the Auditor's office, filed as a part of the bill of The Peoples National Bank of Lynchburg, contradict and disprove the assertion that the subjects of taxation embraced in that section, or any considerable amount in value of them, can be properly classified as "moneyed capital."

As appears from the *eleventh census* for the United States, "*Part III., Population,*" page 1043, and "*Part II.,*" page 421, respectively, there were in Virginia in 1890:

Real estate mortgages, amounting to	$28,691,726
Municipal and county bonded indebtedness, less sinking fund, amounting to	$16,610,081
Aggregate	$45,301,807

In addition to this, there were many million dollars of bonds of railroad and other corporations. A very large proportion of these securities—particularly the real estate mortgages and

the county and municipal bonds—were undoubtedly held by citizens of Virginia, other than that portion held by banks and corporations as part of their capital. What amount was so held by individuals, we are left to conjecture; but it is fair to conclude that they amounted to more than one-half of the subjects assessed under the first subdivision of schedule "C," and that the other half consisted chiefly of amounts due for the purchase of real and personal property, or for leases and wages.

In order to maintain such a suit, it is necessary for the complainant to show *what proportion* of the whole sum of subjects of taxation, from which the deduction of indebtedness was allowed by the State tax laws, consisted of "moneyed capital in the hands of individual citizens of such State;" or, at any rate, to show that the proportion of such subjects which consisted of moneyed capital, amounted to a very considerable, and comparatively a very large sum. This proposition was settled by this court in *First Natl. Bk. of Wellington* v. *Chapman*, and in other cases.

At page 218 of the case just cited (173 U. S.), the court says:

> "It is impossible to tell from anything appearing in the record what proportion of the whole sum of credits consists of moneyed capital within the meaning of the Federal act. We know that claims for labor or services do not consist of that kind of capital. We also know that there are probably large amounts of other forms of property which might enter into the class of credits as defined in the act, which would not be moneyed capital within the meaning of the act of Congress, as that meaning has been defined by this court in the cases above cited.
>
> It is thus seen that there are large and unknown amounts of what are in the act termed credits, which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be

made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens, included in the term credits (and from which some classes of debts can be deducted), bears to the amount invested in national bank shares. We are, therefore, unable to say whether there has or has not been any material discrimination such as the Federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and that of *First Nat. Bank* v. *Ayres*, 160 U. S., 660, and *Aberdeen Bank* (*First Nat. Bank*) v. *Chehalis County*, 166 U. S., 440, and *Bank of Commerce* v. *Seattle*, 166 U. S., 463."

The statements, the reasoning, and the principle enunciated in this paragraph apply with tremendous force to the case at bar.

The precise question considered in this branch of my argument was decided, and the contention of the appellant repudiated, by the Supreme Court of Appeals of Virginia in the case of Burrows v. Smith, 95 *Va.*, 694.

The very concise, but clear and conclusive, opinion of Judge Harrison, who delivered the decision of the court in that case (95 Va., 695), effectually demolishes the theory of appellant's counsel as to the meaning and effect of the Virginia tax law of 1890.

So far, I have argued this particular phase of this litigation from the standpoint of appellant's counsel, and in response to their unwarranted assumption that the first clause of schedule "C" was the portion of the Virginia tax law by which moneyed capital in the hands of individual citizens" of this State was made taxable.

Upon reading the Virginia statute, referred to, this court must be astonished to find that ALL CAPITAL—and particularly *all moneyed capital in the hands of individuals*—is, by the terms of the law, EXCLUDED from the subjects of taxation enumerated in the first clause of schedule "C," and from which alone deductions on account of the indebtedness of the tax-payer are permitted; and that FROM THE VALUE OF "MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS," by the express terms and necessary intendment and meaning of the statute, NO DEDUCTION WHATEVER CAN BE MADE on account of the indebtedness of the tax-payer possessing or entitled to such moneyed capital.

So that the entire main contention of counsel for the appellant is the baseless fabric of a vision.

Now the court will observe that *from none of the subjects of taxation* included in any of the classifications defined in the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th subdivisions of section 8 of schedule "C," *are any deductions whatever allowed by the law to be made on account of the personal indebtedness of the tax-payer.*

I take it, from what I know of the great ability, high character and profound legal learning of my friends, the counsel for the appellant, that they never would have advised their client to institute this suit in the court below if their attention had been called to the language and effect of the 2nd subdivision of section 8 of said schedule "C," which is in the following words:

> "2nd. He (the commissioner of revenue) shall ascertain from each person in his district, city or town the value of CAPITAL, *including moneys*, credits, or other thing remaining invested, whether said investment was made originally in this or any other State or country, and the value of all capital loaned, used or employed in business out of this State, by himself, his agent, or other person for him."

This language, beyond the shadow of a doubt, includes every form of capital in the hands of an individual. *It expressly includes all moneyed capital*, whether used in private banking, and in competition with the business of national banks, or not; and it certainly includes all moneyed capital which could, by possibility, be used in competition with the business of national banks. And the individual owner, holder, or possessor of such moneyed capital is required on oath to make return of its value to the commissioner of revenue; and, from it, even though he be insolvent, he cannot, by the terms of the statute, deduct one dollar of his personal indebtedness, but he is liable to taxation upon every dollar of the value thereof, without abatement or deduction.

It is no answer to this that the aggregate amount of such moneyed capital, assessed for taxation by the commissioner of revenue, is small, as appears from the appellant's second amended bill and the exhibits filed therewith. This circumstance merely shows either one of three things: that the aggregate amount of moneyed capital in Virginia in the hands of individuals is small; or that the individual tax-payers have failed to disclose it to the commissioners of revenue; or that the commissioners of revenue have failed to do their duty in requiring the individual citizens of the State to make returns under oath of such capital. The smallness of the amount ascertained by the commissioners of revenue does not affect the question. It was ALL, by the express terms of the statute, MADE TAXABLE AT ITS FULL VALUE, WITHOUT DEDUCTION.

While it seems to me that nothing more need be said, to demonstrate the utter groundlessness of the complaint of the appellant in this cause, I hope the court will pardon me for re-

ferring to one or two matters in vindication of the purpose and effect of these Virginia statutes.

(a). It is charged that the assessment is arbitrary, and without adequate notice to the shareholder. To this I need only reply that the Virginia mode of assessment is no more summary than that provided in the Ohio statute, fully sanctioned by this court in *First Natl. Bk. of Wellington* v. *Chapman,* and in other cases where modes similar to that adopted by Virginia for ascertaining the value of the stock had been adopted by other States.

This court seems to have regarded the national banks as the agents and representatives of their shareholders, to this extent: that a notice to the bank of the tax levied, and of the assessment made upon its shares of stock, is treated as notice to its stockholders.

Such a notice ought to be sufficient; for the officers of the bank, having the names and addresses of its stockholders, can readily apprise them as to what taxes are levied upon their shares, of which, in fact and in law, the statute levying the tax is sufficient notice. And the bank officers can also readily apprise their shareholders what is the market value, or assessed valuation, of their shares.

Indeed, it would be difficult, particularly as to non-resident shareholders, to give them this information through any channel by which it would so certainly reach them.

(b). Another of the objections made by counsel for the appellant to the Virginia statute, not already noticed, is as to the mode in which the value of stock is ascertained. The answer to this, as to all of the assessments made since 1895, is that the valuation is ascertained by the cashier of the bank—a mode of which certainly the shareholders of the bank cannot complain, and which is practically the same that has been adopted by a number of states whose statutes have been reviewed by this court without objection or criticism on this ground. And, as to all the period covered by this litigation, there is no charge that the market value of the stock is less than was ascertained

by the commissioner of revenue. The only real criticism has been because no deduction was made from the market value of all of the shares, on account of the assessed value of the real estate of the bank, and that no deduction was made from the shares owned by persons who claim deductions for indebtedness, because of such indebtedness; which two objections have been already disposed of. And, as to all of the assessments, too, it will be observed that they are the same which were made as a basis of taxation by the city of Lynchburg, which have been acquiesced in by the appellant and by the shareholders, as appears by the record, for all the period since 1890. That the valuation by the commissioner of revenue is not excessive, is further shown by the fact that, after 1895, when the valuation was fixed by the bank or its cashier, it was ascertained to be the same at which it had been previously assessed by the commissioner of revenue. (See copies of the commissioner's returns, pages 38-65 of record.)

(c). The attention of the court is invited to the Virginia tax law, in question in this case (a copy of so much of which as has any bearing upon this litigation will be appended to this brief), and to the whole scheme of taxation therein embodied.

From an examination of this, it will abundantly appear that there is no discrimination, unfriendly or otherwise, intended or actual, against the shares of national banks; but, indeed, that there is discrimination *in favor* of investments in bank shares as compared with other corporate investments—including among them even the shares in savings banks, trust companies, and other financial institutions. Among other things, it will be seen that no deduction is allowed on account of indebtedness from the assessed value of personal estate and credits under the control of any person as receiver or commissioner of any court, under the 5th subdivision of section 8 of schedule "C"; that none is permitted from the value of any personal estate or credits deposited to the credit of any suit, but not in the hands of a receiver, under the 6th subdivision of said section; and that no deduction is permitted from the amount of all money belonging to the tax-payer, *on deposit* to his credit with any

bank or other corporation or firm or person; and that, in effect, and by every form of words by which this purpose of the legislature of Virginia could well have been expressed, it has, by the tax laws it has enacted, made "moneyed capital in the hands of individual citizens of such State" liable to taxation without abatement or deduction on account of any indebtedness of the tax-payer.

No injustice has been done by these tax laws to the owners of shares in national banks, or banking associations or institutions.

There is no ground of complaint upon the facts shown by the record in this case.

There is no class of property owners in any community who should more cheerfully contribute their due proportion towards the support of the government; for there is no class in the State who are more indebted than they to the government, whose interests are more carefully safeguarded, or who require and receive greater protection and security, not only from the police of the communities where such banks are located, but from the courts of justice in which they are so often unavoidably compelled to be litigants in order to enforce the collection of notes and obligations given to these banks.

For these and other reasons apparent on the face of the record in this case, I respectfully submit that the appellant's suit is without equity, and that the decree of the court below should be affirmed.

WILLIAM A. ANDERSON,

Attorney-General of Virginia, and *Ex-Officio* Counsel for the Appellee.

Richmond, Virginia, September, 1903.

APPENDIX

(Virginia Acts of Assembly, 1889-1890, p. 197 et seq.)

CHAP. 244.—An ACT to provide for the assessment of taxes on persons, property, and incomes, and on licenses to transact business and imposing taxes thereon for the support of the government and public free schools, and to pay the interest on the public debt, and prescribing the mode of obtaining licenses to sell wine, ardent spirits, malt liquors, or any mixture thereof, in cases where a court certificate is required.

Approved March 6, 1890.

1. Be it enacted by the General Assembly of Virginia, That the taxes on lands, lots, persons, and subjects, as ascertained under the provisions of the act prescribing general provisions in relation to commissioners of the revenue and the assessment of taxes on persons, property, income, licenses, and so forth, under the Code of eighteen hundred and eighty-seven, and on the persons and subjects required to be listed by chapter one of this act, and on business or other subjects not required to be listed, but to be taxed, shall for the year commencing on the first day of February, eighteen hundred and ninety, and each year thereafter, be as follows:

Taxes on lands and lots.

2. On tracts of lands and lots and the improvements thereon not exempt from taxation, there shall be a tax of thirty cents on every hundred dollars of the assessed value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars of the assessed value thereof, which shall be applied to the support of the public free schools of the State.

3. The taxable subjects shall be classified by schedules and numbered as follows, to-wit:

SCHEDULE A.

4. The classification and numbers under schedule A shall be as follows, to-wit:

First. The number of white male inhabitants who have attained the age of twenty years, not exonerated from taxation by order of the County or Corporation Court of his residence by reason of their inability, from bodily infirmity, to pay capitation tax.

Second. The number of colored male inhabitants who have attained the age of twenty-one years, not exonerated by order of the County or Corporation Court of his residence, by reason of their inability from bodily infirmity, to pay capitation tax.

Tax on persons.

5. Upon every male person, as classified in this schedule, over the age of twenty-one years, not exempt from taxation for bodily infirmity, there shall be a tax of one dollar for public free school purposes.

SCHEDULE B.

6. The classification and numbers under schedule B shall be as follows:

Personal estate.

First. The aggregate number of horses, mules, asses and jennets, and the value thereof.

Second. The number of cattle, and the value thereof.

Third. The number of sheep and goats, and the value thereof.

Fourth. The number of hogs, and the value thereof.

Fifth. The aggregate number and value of all pleasure-carriages, stage-coaches, carts, wagons, carry-logs, spring wagons, carryalls, gigs, buggies, sleighs, and vehicles of like kind to either of those enumerated.

Sixth. The aggregate value of all books and pictures, except so far as the same are exempt by law.

Seventh. The aggregate value of all tools of mechanics.

Eighth. The aggregate value of all farming implements, pound-nets, and seines intended or used for the catching or taking of fish.

Ninth. The aggregate value of all mineral productions.

Tenth. The aggregate value of all felled timber, cord wood, hoop-poles, staves, and bark which has been felled for sale by other than the owner of the land upon which it has been felled within twelve months preceding the first day of February of each year.

Eleventh. The number of watches, and the value thereof.

Twelfth. The number of clocks and sewing-machines, and the value thereof.

Thirteenth. The aggregate number and value of piano-fortes, melodeons, harps, organs, and musical instruments of all kinds.

Fourteenth. The aggregate value of all household and kitchen furniture.

Fifteenth. The aggregate value of gold and silver plate, plated ware, diamonds, cameos, or other precious stones or precious metals used as ornaments or jewelry, not including such subjects as are embraced in any other number of this schedule.

Sixteenth. The aggregate value of grain, tobacco, and other agricultural productions in the hands or possession, legal or constructive, of a purchaser.

Seventeenth. The number of boats or water crafts under five tons burthen, and the aggregate value thereof; the number of all ships, barges, boats, or other water crafts of five tons burthen and over, and the aggregate value thereof, with their tackle, rigging, and furniture, and all else that pertains to them, or of any share or interest in such owned by any person in Virginia, though the said ships or any of them may not be, at the time when the assessment was made, in the waters of Virginia; and the aggregate marketable value of all other personal property not specifically enumerated in this or other schedules, and not exempt from taxation: provided, that grain, tobacco, and other agricultural productions in the hands of a producer

of the same are hereby declared exempt from taxation as property under this schedule.

Eighteenth. The aggregate value of all shot-guns, rifles, muskets, and other firearms, bowie-knives, dirks, and all weapons of a similar kind: provided, that all firearms issued by the State to members of volunteer companies or for purposes of police shall not be listed for taxation.

Tax on personal property.

7. On all personal property mentioned in this schedule there shall be a tax of thirty cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars' value thereof, which shall be applied to the support of the public free schools of the State.

SCHEDULE C.

8. The classification and numbers under Schedule C shall be as follows—to-wit:

On personal property in choses in action, moneys, credits, and capital.

First. The commissioner shall require each person residing in his district, city, or town to exhibit and make oath to a statement in the aggregate of all bonds, notes, and other evidences of debt due and payable to such persons, in excess of one hundred dollars, the amounts of such bonds, notes, and other evidences of debt under one hundred dollars each to be given under oath, in the aggregate, the solvency of which, in cases of doubt, as well as the value thereof, shall be determined by the said commissioner; which said list shall be signed by the commissioner and tax-payer, including bonds due from railroad and canal companies, bonds of counties, cities, and towns, and bonds of other States and corporations; demands and claims, however evidenced, owing or coming to such person, whether

due or not, from debtors residing out of or within the State or county, whether secured by deed of trust or by judgment, or not, deducting from the aggregate amount thereof all such bonds, demands, or claims, not otherwise deducted, owing to others from such person as principal debtor, and not as grantor, endorser, or surety. The aggregate of principal, interest, and exchange shall constitute the amount of a bond, demand, or claim due and payable; and the principal, with interest rebated when the amount of the bond, demand, or claim bears no interest, shall constitute the amount of the bond, demand or claim not yet due and payable. But no bond, demand, or claim constituting a part of the capital, as defined in chapter one of this act, of a business done out of this State shall be included in this section. If any person, firm, or banking association shall, with a view to evade the payment of taxes, fail or refuse to give into the commissioner of the revenue a statement of the aggregate of any bonds, notes, claims or other evidences of debt which are subject to assessment and taxation under chapter one of this act, the same shall not be recoverable by action at law or suit in equity before any of the courts of this Commonwealth, legal process or sale, under deed of trust, until they shall have been reported for assessment and tax paid thereon, with an addition of fifty per centum per annum from the time the tax accrued; and the failure to give in the aggregate of said bonds, notes, claims, and so forth, shall be taken as prima facie evidence of the intention to so evade the payment of taxes.

Second. He shall ascertain from each person in his district, city or town the value of capital, including moneys, credits, or other thing remaining invested, whether said investment was made originally in this or any other State or country, and the value of all capital loaned, used, or employed in business out of this State by himself, his agent, or other person for him.

Third. He shall ascertain the value of all capital of incorporated joint stock companies not otherwise taxed; but real estate belonging to such company shall not be held to be capital, but shall be listed and taxed as property, and not as capital.

Fourth. He shall ascertain from each person in his district, city, or town the amount of capital invested, used, or employed in any trade or business not otherwise taxed; moneys and credits actively used and employed in carrying on the trade or business, including goods, wares, and merchandise on hand, and all solvent bonds, demands, or claims made or contracted in the course of business during the preceding year shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be assessed and taxed as other specific property; but nothing herein shall be held to exclude from taxation any property which is the subject of such business.

Fifth. He shall ascertain from each person residing in his district, city, or town, the aggregate amount of money and the value of principal and interest of personal estate and credits under his control as court receiver or commissioner, in pursuance of any order, judgment, or decree of any court as agent, guardian, or other fiduciary. And it shall be the duty of the clerks of courts to furnish commissioners with a list of all evidences of debts under the control of courts, receivers, or commissioners as evidenced by decrees of the courts.

Sixth. He shall ascertain the amount of any money and the value of any personal estate or credits deposited to the credit of any suit and not in the hands of a receiver.

Seventh. He shall ascertain the value of all toll-bridges, turnpikes, and ferries in his district other than steam ferries.

Eighth. He shall ascertain from each person residing in his district, city, or town all money belonging to him on deposit to the credit of such person with any bank, or other corporation, or firm, or person.

Taxes on personal property in choses in action, and so forth, and toll-bridges.

9. On all personal property in choses in action, and so forth, and toll-bridges, turnpikes, and ferries, and moneys in cur-

rency as embraced in this schedule, there shall be a tax of thirty cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the payment of expenses of the government and a further tax of ten cents on every hundred dollars of the value thereof, which shall be applied to the support of the public free schools of this State.

SCHEDULE D.

10. The classification and numbers under schedule D shall be as follows, to-wit: He shall ascertain from each person in his district the aggregate amount of income in excess of six hundred dollars, whether received or due, though not received within the year next preceding the first of February in each year, except salaries of officers of the State, payable at the treasury, the tax on which shall be collected at the time the salary is audited and paid; at which time, also, the auditor shall deduct all indebtedness of such officer. The word "income" shall include all rents, salaries, interest upon notes, stocks, bonds, or other securities not otherwise taxed, of whatever description, of the United States, or any other State or country, or any corporation, company, partnership, firm, or individual, collected or received during the year, less the interest due and paid by said persons during the year; the amount of all premiums on gold, silver, or coupons; the amount of sales of live stock and meat of all kinds, less the value thereof at the time of the assessment of the same: provided, the said value has heretofore been taxed as capital; the amount of sales of wood, butter, cheese, hay, tobacco, grain, or other vegetable, agricultural, or other production grown or produced by said person: provided, that the amount derived by the producer from the sale of any agricultural production during the preceding year, whether the same was grown during the preceding year or not, shall be assessed and taxed as income; all other gains and profits derived from any source whatsoever, and the shares of the gains and profits of all companies, whether incorporated or partnership, of any person who would be entitled to the same if divided, whether said profits have been divided or not: provided, that

in addition to the sum of six hundred dollars as aforesaid, there shall be deducted from the income of the person assessed all losses sustained during the year; all losses incurred in trade, all sums actually paid for labor, ditches, fences, taxes, and rents; all fertilizers, clover or other seed, purchased and used by any person who cultivates land, except sums paid out for improvements, new buildings, and betterments made to increase the value of property or estate: and provided, further, that only one deduction of six hundred dollars shall be made from the aggregate income of any family, except that guardians may make a separate deduction of six hundred dollars in favor of each ward out of income coming to said ward.

Tax on income.

11. On the income derived from the interest or profits, as the same is defined in this schedule, the tax shall be one per centum on the amount of such income in excess of six hundred dollars.

On Business and Other Subjects.

Taxes on banks.

17. No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States; but the stockholders in such banks or banking associations shall be assessed and taxed on the market value of their shares of stock therein at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in this State. It shall be the duty of each commissioner of the revenue annually, during the month of May, to report to the Auditor of Public Accounts the name of each bank or banking association doing business in his district, and the names of the officers thereof, and to assess the share or shares of each stockholder in the banks or banking associations as aforesaid at the market value thereof as of the first day of February in each year, and it shall be the duty of each

of such banks or banking associations forthwith to pay into the Treasury of the State the tax imposed by law upon such assessment of the shares aforesaid on or before the first day of June. If such tax be not paid within thirty days after the assessment of said shares, the cashier of the bank or banking association failing to make payment, and his sureties, shall be liable for the same, and twenty per centum upon the amount to be recovered, on motion of the Auditor of Public Accounts, in the Circuit Court of the city of Richmond, upon fifteen days' notice, according to the provisions of the section seven hundred and thirteen of the Code of Virginia. The real estate of all banks and banking associations shall be assessed on the land books of the commissioners of the revenue with the same taxes with which other real estate is assessed.

LICENSES.

Stock brokers and private bankers.

60. No person, bank, or corporation shall, without a license authorized by law, act as a stock broker or a private banker. Any person, bank, or corporation that deals in coin, foreign or domestic exchange, government stock, or other certificates of debt, or shares in any corporation or chartered company, bank notes, or other notes used as a currency, or to sell the same or any of them on commission or for other compensation, or who negotiates loans upon real estate securities, shall be deemed to be a stock broker. A stock broker shall have the right to buy and sell for profit or to sell on commission the coin, exchange, stocks, certificates of debt, shares in chartered companies, bank notes, and notes used as a currency as aforesaid, and may sell either privately or by auction, and also negotiate loans upon real estate securities. Any person, bank or corporation engaged in the business of receiving money on deposit, or in lending or advancing money, or in negotiating loans or any class of securities, or in discounting, buying, or selling negotiable or other paper or credits, commonly known as street brokers, whether at an office kept for the purpose or

elsewhere, shall be deemed to be a private banker, and in the latter case the tax shall be paid for the additional privilege of private banking. Any person, bank, or corporation violating the provisions of this section shall pay a fine of not less than one hundred dollars not more than five hundred dollars for each offense.

License to stock brokers and private bankers.

61. A stock broker shall pay for the privilege of transacting business the sum of one hundred dollars, but in towns of less than ten and more than five thousand inhabitants he shall pay one hundred and fifty dollars, and in towns in excess of ten thousand inhabitants he shall pay two hundred and fifty dollars for each office or place of business kept for that purpose, and a private banker shall pay fifty dollars on a capital of five thousand dollars or under; one hundred dollars on a capital from five to ten thousand dollars; one hundred and fifty dollars on a capital from ten to twenty thousand dollars, and two hundred and fifty dollars on a capital of over twenty thousand dollars and under thirty thousand dollars, and an additional sum of five dollars per thousand on every thousand dollars in excess of thirty thousand.

Office Supreme Court U.S.
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OCT 21 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 24.

THE PEOPLES NATIONAL BANK OF LYNCHBURG, VIRGINIA, APPELLANT,

vs.

MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, APPELLEE.

ADDITIONAL AUTHORITIES RELIED ON BY COUNSEL FOR APPELLEE, BUT NOT CITED IN HIS BRIEF.

It was settled by a decision of the supreme court of appeals of Virginia that under the tax law of Virginia of March 6, 1890, the shares of capital stock of corporations or joint stock companies were taxed at the same time the capital of such company was taxed.

Commonwealth *vs.* Charlottesville P. B. & L. Co., 90 Va., 790, *792*.

As to notice of levy and assessment of tax, if the tax is to be collected by a suit, that is sufficient notice.

Hagar *vs.* Reclamation District, 111 U. S., 701, *715*;
Approved in Turpin *vs.* Lemon, 187 U. S., 51, *58*.
See also McMillan *vs.* Anderson, 95 U. S., 37.

A party who fails to show that he has been actually injured by the application of a law should not be heard to maintain a suit to test its validity.

Turpin *vs.* Lemon, 187 U. S., 60, *61*.
Tyler *vs.* Judges of Registration, 179 U. S., 405.

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